

United States ¹⁰

Circuit Court of Appeals

For the Ninth Circuit.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

MIKE KOSO,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.

FILED
OCT 16 1920
F. D. MONCKTON,
CLERK

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Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. FAVOUR & CORNICK, Prescott, Arizona,
Attorneys for Plaintiff in Error.

F. C. STRUCKMEYER, Esq., Phoenix, Arizona, and
R. B. WESTERVELT, Esq., Prescott, Arizona,
Attorneys for Defendant in Error.



In the District Court of the United States for the
District of Arizona.

No. —.

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of
action alleges:

I.

That plaintiff is a citizen of the country of Finland,
a province of Russia, and a resident of the State of
Arizona, in said district. That defendant is a cor-
poration duly organized, and at all times herein men-
tioned had, and now has, an office and an agent in
Yavapai County, State of Arizona, in said district;
owned, and now owns property, conducted, and now
conducts business in said county, State and district.

II.

That defendant at all times herein mentioned was, and now is, engaged in the business of mining within the County of Yavapai, State and District aforesaid, owning, controlling and operating a certain mine known as the United Verde Extension Mine, located at or near the town of Jerome, Yavapai County, Arizona; that in the process of the development of said mine defendant caused to be excavated, established, built and maintained therein a main shaft, twelve hundred [1*] foot drift or level, and defendant constructed and maintained in said twelve hundred foot drift or level a track and mine car for the purpose of transferring loose rock and earth out of said twelve hundred foot drift or level to said main shaft.

III.

That on or about six-thirty (6:30) o'clock A. M. on December 15, 1917, plaintiff was employed by defendant and was engaged in the performance of work and labor for the defendant in shoveling certain loose rock and earth near the face of said twelve hundred foot drift or level into said mine car for the purpose of being transferred to said main shaft; and in performing said work plaintiff was using the appliance furnished by defendant for the performance of said work; that said work and labor being so performed by plaintiff for defendant was work and labor in or about the hazardous occupation of mining and within the scope of plaintiff's employment; and while so engaged in the regular course of said work plaintiff was injured by accident arising out of and

*Page-number appearing at foot of page of original certified Transcript of Record.

in the course of his said labor, service and employment, and due to a condition or conditions of such employment, and without negligence on his part, in the following manner, to wit: At about the above-mentioned time plaintiff was working in said twelve hundred foot drift or level at a point near the face of said drift, and was engaged in shoveling loose rock and earth into said mine car as aforesaid, when certain large rocks and boulders fell from the roof of said drift, and struck plaintiff on his shoulders and back, and his left foot, knocking plaintiff down on the floor of said drift, and cut, bruised, broke and mangled plaintiff's shoulders, back and foot, and thereupon seriously, painfully, and permanently injured plaintiff. [2]

IV.

That as a proximate result of said accident, plaintiff's shoulders were made sore, and were crushed, mashed, broken and bruised, and plaintiff's back and spinal column was mashed, broken, bruised and permanently injured, and plaintiff's right kidney was made sore and inflamed, and plaintiff's left foot was cut and bruised, and plaintiff has thereby been deformed and permanently and irreparably injured; all to his great damage.

V.

That plaintiff has paid out and incurred liabilities for, and in the future will be compelled to pay out and incur liabilities for large sums of money for surgical aid, hospital fees, medicine, care, nursing and attention, and that he has had his ability and power to labor diminished; all to the great damage of the

plaintiff in the sum of Twenty-five Thousand (\$25,000) Dollars, and for his costs herein.

(Sgn.) J. J. COX,

(Sgn.) A. Y. MOORE,

(Sgn.) L. J. COX,

Attys. for Plaintiff.

For a second cause of action, plaintiff reiterates all the allegations contained in paragraphs numbered I and II of his first cause of action, and in addition thereto alleges as follows:

III.

That plaintiff at the time of the injury hereinafter complained of was in the employ of defendant as mucker in defendant's said mine, and in this capacity his duties were to shovel loose rock and earth into said mine car, to be [3] transferred from near the face of said twelve hundred foot drift or level to the main shaft of said mine.

IV.

That on December 15, 1917, plaintiff was directed by defendant to shovel certain loose rock and earth near the face of said twelve hundred foot drift or level into said mine car; and at or about six-thirty (6:30) o'clock A. M. on said day, plaintiff was shoveling said loose rock and earth near the face of said twelve hundred foot drift or level into said mine car, when the roof of said twelve hundred foot drift or level, immediately over plaintiff's head, gave way, or caved in, and certain large rocks and boulders fell from said roof and struck plaintiff's back, shoulders and left leg, and greatly crushed, bruised, broke, mangled and lacerated plaintiff's said shoulders,

back and leg; that defendant then and there failed to provide this plaintiff a safe place in which to work, in this: Defendant negligently failed to timber said twelve hundred foot drift or level at the point where plaintiff was working, and said drift or level was negligently and unknown to plaintiff, left in an unsafe condition by reason of not having sufficient timbers therein to support the roof of said drift or level, and plaintiff alleges that, but for the negligence of defendant in this regard, plaintiff would not have received said injuries.

V.

That as the proximate result of said negligent acts of the defendant plaintiff's shoulders were cut, bruised and broken, and plaintiff's back was cut, bruised, mangled, lacerated and broken, and plaintiff's left leg was cut and bruised, and made sore, and plaintiff was thereby deformed and permanently injured; all to his great damage. [4]

That plaintiff has paid out, and incurred liabilities for, and in the future will be compelled to pay out and incur liabilities for large sums of money for surgical aid, hospital fees, medicine, care, nursing and attention, and that he has had his ability and power to labor diminished, and by reason of said injuries has suffered great mental pain and anguish and humiliation, and will continue to suffer for the remainder of his life; all to the great damage of the plaintiff in the sum of Twenty-five Thousand (\$25,000) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Twenty-five Thousand (\$25,000) Dollars, and his costs herein.

(Sgn.) J. J. COX,

(Sgn.) A. Y. MOORE,

(Sgn.) L. J. COX,

Attorneys for Plf.

[Endorsements]: No. 45 (Prescott). In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Complaint. J J. Cox, A. Y. Moore, L. J. Cox, Attys. for Plaintiff. Filed Mar. 1, 1918. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [5]

UNITED STATES OF AMERICA.

District Court of the United States, District of
Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Phoenix, and County of Maricopa, on the Prescott side.

Summons.

The President of the United States of America,
GREETING: To United Verde Extension Min-
ing Company, a Corporation, Defendant:

YOU ARE HEREBY DIRECTED TO APPEAR
and answer the complaint in an action entitled as
above, brought against you in the District Court of
the United States, in and for the District of Arizona,
within 20 days after the service on you of this sum-
mons—if served within this county, or within thirty
days if served elsewhere.

And you are hereby notified that unless you appear
and answer as above required, the said plaintiff will
take judgment for any money or damages demanded
in the complaint, as arising upon contract, or he will
apply to the Court for any other relief demanded
in the complaint.

WITNESS, the Honorable WILLIAM H. SAW-
TELLE, Judge of said District Court, this first day
of March, in the year of our Lord one thousand nine
hundred and eighteen and of our Independence the
one hundred and forty-second.

[Seal of said Court] MOSE DRACHMAN,
Clerk.

By Nat T. McKee,
Deputy Clerk.

(MARSHAL'S RETURN.)

United States Marshal's Office,
District of Arizona.

I hereby certify that I received the within writ
on the 2d day of March, 1918, and personally served

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the same on the 4th day of March, 1918, upon United Verde Extension Mining Co., by delivering to and leaving with George Kingdon, Assistant General Manager of the above-named corporation, said defendant named therein personally, at the town of Jerome, [6] County of Yavapai, in said district, a certified copy thereof, together with a copy of the complaint, attached thereto.

J. P. DILLON,
U. S. Marshal.

By Harry Carlson,
Office Deputy.

March 27, 1918.

[Endorsements]: No. 45 (Prescott). U. S. District Court, District of Arizona. Mike Koso vs. United Verde Extension Mining Company, a Corporation. Summons. J. J. Cox, A. Y. Moore & L. J. Cox, Plaintiff's Attorneys. Filed Mar. 27, 1918. Mose Drachman, Clerk. By Benj. J. Kimber, Deputy Clerk. [7]

In the District Court of the United States for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Answer.

Comes now defendant, United Verde Extension Mining Company, a corporation, and answers plaintiff's complaint as follows:

DEMURRER TO WHOLE COMPLAINT.

Answering said complaint, defendant demurs to the whole thereof, on the ground that it appears upon the face of said complaint that two several causes of action, to wit, a cause of action *ex contractu* arising under Chapter VI of Title XIV of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and a cause of action *ex delicto* arising under the common law, are improperly united in said complaint.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant. [8]

DEMURRER TO FIRST CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrer to the whole thereof, defendant demurs to the first cause of action therein stated on the following grounds, to wit:

I.

That it appears upon the face of said complaint that the facts stated in said first cause of action are not sufficient to constitute a cause of action against defendant.

II.

That it appears upon the face of said complaint that plaintiff seeks in said first cause of action to

recover a judgment for damages against defendant under and by virtue of the provisions of Chapter VI of Title XVI of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of section VII of Article XVIII of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of defendant causing or contributing to plaintiff's alleged injury and that said Employers' Liability Law and said Section VII of Article XVIII of the Constitution of the State of Arizona, are in contravention and violation of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, in that they seek to deprive defendant of its property without due process of law and to deny it the equal protection of the laws of [9] the State of Arizona, by subjecting it to unlimited liability for damages for personal injuries suffered by its employee without any negligence, wrong or default on the part of defendant causing or contributing to such injuries, and that for the reasons in this paragraph set forth, said complaint does not state facts sufficient to constitute a cause of action against defendant.

WHEREFORE, defendant prays judgment as to the sufficiency of said first cause of action, and for its costs.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

PLEA IN BAR OF FIRST CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrers, or either of them, defendant admits the allegations of paragraph I of said first cause of action, and denies each and every, all and singular, the remaining allegations in said first cause of action contained.

WHEREFORE, having fully answered said first cause of action, defendant prays that plaintiff take nothing thereby, and that defendant have and recover its costs herein expended.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

DEMURRER TO SECOND CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrer to the whole thereof, defendant demurs to the second cause of action therein stated, on the ground that it appears upon the face of [10] said complaint that the facts stated in said second cause of action are not sufficient to constitute a cause of action against defendant.

WHEREFORE, defendant prays judgment as to the sufficiency of said second cause of action, and for its costs.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

PLEA IN BAR OF SECOND CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrers, or either of them, defendant admits the allegations of paragraph I of said first cause of action, incorporated into and made

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a part of said second cause of action, and denies each and every, all and singular the remaining allegations in said second cause of action contained.

WHEREFORE, having fully answered said second cause of action defendant prays that plaintiff take nothing hereby, and that defendant have and recover its costs herein expended.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

[Endorsements]: No. 45—(Prescott). In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Answer. Service of a copy of the within answer is admitted this 21st day of March, 1918. Cox, Moore & Cox, Attorneys for Plaintiff. Filed March 22d, 1918. Mose Drachman, Clerk. By Nat T. McKee, Deputy. [11]

In the District Court of the United States for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Motion for Security for Costs.

Comes now the above-named defendant and respectfully moves the Court to require plaintiff in the above-entitled action to furnish a good and sufficient cost bond or security for costs, in a reasonable sum to be fixed by the Court, and that the Court make order accordingly.

(Sgn.) A. H. FAVOUR,
Attorney for Defendant. [12]

In the District Court of the United States for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Affidavit on Motion for Security for Costs.

State of Arizona,
County of Yavapai,—ss.

Erle H. Thompson, being duly sworn, deposes and says:

That he is the Claim Agent for the defendant in the above-entitled cause, and for and on its behalf, makes this affidavit, being duly authorized and knowing of his own knowledge the facts herein stated.

That to the best of affiant's knowledge and belief,

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and so far as he has been able to ascertain, the plaintiff, Mike Koso, is not the owner of any property out of which costs could be made by execution sale.

(Signed) ERLE H. THOMPSON.

Subscribed and sworn to before me this 2d day of January, 1919.

[Seal]

DAISY D. JONES,
Notary Public.

My commission expires January 7, 1922. [13]

In the District Court of the United States for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Notice of Motion for Security for Costs.

To Cox, Moore and Cox, Esqrs., Attorneys of Record
for the Above-named Defendant, and to Mike
Koso:

The plaintiff in the above-entitled cause, and his attorneys, will please take notice that upon the affidavit and papers in said action I shall move the Court at the courtroom thereof at Tucson, Arizona, on the 25th day of January, 1919, at the opening of court on that day, or as soon thereafter as counsel

can be heard, to require said plaintiff to give security for costs in this action.

(Sgn.) A. H. FAVOUR,
Attorney for Defendant.

Prescott, Arizona, Jan. 15, 1919.

[Endorsements]: No. 45 (Prescott). In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Motion for Security for Costs, Affidavit and Notice of Motion. Filed January 18, 1919. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk.
[14]

In the District Court of the United States for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**Objections to Sufficiency of Motion for Security for
Costs.**

Comes now plaintiff by his attorneys and objects to the sufficiency of the showing made by defendant to require plaintiff to give security for costs on the ground that said application does not comply with

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the laws of the State of Arizona concerning such application for security for costs, and does not show that plaintiff is not the owner of property out of which costs could be made by execution sale.

COX & MOORE,

Attorneys for Plaintiff.

[Endorsements]: No. 45 (Prescott). In the District Court of the United States, for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Objections to Sufficiency for Security for Costs. Filed January 24th, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [15]

At a regular term, to wit, the October, 1918, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Phoenix, State and District of Arizona, on Thursday, the 6th day of February, A. D. 1919. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—February 6, 1919.)

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

**Minutes of Court — February 6, 1919 — Order
Submitting Motion for Security for Costs.**

The motion for security for costs heretofore filed by the defendant in this case is this day submitted and by the Court taken under advisement. [16]

At an adjourned term, to wit, the March, 1919, adjourned term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Prescott, State and District of Arizona, on Monday, the 4th day of August, A. D. 1919. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—August 4th, 19¹⁹20.)

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—August 4, 19¹⁹20—Order Overruling Motion for Security for Costs.

The motion of the defendant to require plaintiff to furnish security for costs in this case having been heretofore submitted, and having been duly considered,

IT IS ORDERED by the Court that said motion be, and the same hereby is, overruled.

IT IS FURTHER ORDERED that Messrs. Favour and Cornick be entered as attorneys of record for defendant. [17]

At a regular term, to wit, the March, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Prescott, State and District of Arizona, on Monday, March 22, 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—March 22, 1920.)

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—March 22, 1920—Order of Substitution of Attorneys, etc.

IT IS ORDERED by the Court that R. B. Westervelt, Esq., and F. C. Struckmeyer, Esq., be substituted in the place of and for A. Y. Moore, Esq., and J. J. Cox, Esq., as attorneys for plaintiff.

IT IS ORDERED by the Court that the plaintiff herein elects to proceed in this case under the first cause of action of the complainant herein and that

the second cause of action may be and the same is hereby dismissed; and it is further ordered by the Court, that defendant's demurrer to said first cause of action be and the same is hereby overruled, to which ruling on the part of the Court the defendant then and there in open court duly excepted; and it is further ordered by the Court that the defendant be permitted to file an amended answer this day, to conform with the pleadings as they now stand. [18]

At a regular term, to wit, the March, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Prescott, State and District of Arizona, on Thursday, the 25th day of March, A. D. 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—March 25, 1920.)

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—March 25, 1920—Trial.

This case coming on regularly for trial this day, come now Messrs. Struckmeyer, Barnum and Wes-

tervelt for and on behalf of the plaintiff, and also the plaintiff in person, and come also Messrs. Favour & Cornick, attorneys for defendant. Both sides announce ready for trial. Thereupon sixteen jurors were called into the jury-box by the clerk and duly sworn to answer as to their qualifications, and were then examined by respective counsel; thereupon counsel or the defendant challenged for cause juror F. L. France, which challenge was resisted by counsel for the plaintiff, and denied by the Court, to which ruling of the Court the defendant then and there in open court duly excepted; thereupon respective counsel exercised their peremptory challenges and the following twelve jurors were selected to try this case, and duly sworn for that purpose, viz.: J. E. Richards, Walter J. Codington, William Howard Snody, C. E. Bisbee, J. Burgess, Fred T. Moore. C. R. Standridge, E. E. Ruth, K. V. West, A. J. Laswell, G. C. Overson, W. S. Bennett.

E. W. Powers was then duly sworn as court reporter in this case. The complaint filed herein was then read to the jury by F. C. Struckmeyer, Esq., attorney for the plaintiff; thereupon H. [19] H. Cornick, Esq., attorney for the defendant, read defendant's answer herein, to the jury. Thereupon, the plaintiff Mike Koso, for the purpose of maintaining on his part, the issues joined in this case, took the witness-stand in his own behalf and was duly sworn, examined and cross-examined; and for the purpose of further maintaining on the part of the plaintiff the issues joined herein, Win Wylie was called as a witness for the plaintiff, duly

sworn and examined, but not cross-examined; thereupon the plaintiff rested his case.

The defendant then, for the purpose of maintaining on its part the issues joined in this case, called the following witnesses, each of whom, in turn, was duly sworn, and examined and cross-examined, viz.: Samon Giles, Earl Thompson, L. P. Call, H. T. Southworth.

Thereupon the defendant rested its case.

The plaintiff then called in rebuttal the witness Win Wylie for further examination.

The defendant thereupon moved the Court for a verdict in favor of the defendant, which motion was denied by the Court.

There being no further evidence offered and the case being closed and completed, the same was argued by respective counsel to the jury, after which the jury was instructed by the Court; the jury then retired, in charge of their bailiff, Wm. F. Hattan first duly sworn for that purpose, to consider their verdict; and, after a time the jury returned into open court, in charge of their bailiff, and, upon being asked by the Court if they have agreed upon a verdict, through their foreman, state that they have agreed. Whereupon said jury, through their foreman, present their verdict, as follows:

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled [20] action, upon our oaths, do find for the plaintiff and assess his damages at \$7,500.00 (Seven Thousand Five Hundred Dollars).

WILLIAM HOWARD SNODDY,
Foreman.

And, the clerk, inquiring of said jury is such was their verdict, they stated that it was, and so said they all; whereupon the Court ordered the verdict recorded, and the jury discharged from the case.

AND IT IS ORDERED, ADJUDGED AND DECREED by the Court that judgment be entered in favor of said plaintiff and against said defendant in the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars, together with plaintiff's costs herein expended, in accordance with the verdict of the jury.

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

Judgment.

This cause coming on regularly for trial on this day, Messrs. Struckmeyer, Barnum and Westervelt, appearing for the plaintiff herein, and Messrs. Favour and Cornick appearing for the defendant

herein, upon the complaint of the plaintiff, and the answer of the defendant herein, this case was tried by the Court and a lawful jury of twelve men, and evidence was offered and submitted by the defendant herein, as well as by the plaintiff herein; and the case, being argued by respective counsel, was submitted to the jury under the instructions of the Court; the jury retired to consider of their verdict and, on this 25th day of March, 1920, returned into court the following verdict:

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at \$7,500.00 (Seven Thousand Five Hundred Dollars.)

WILLIAM HOWARD SNODDY,

Foreman. [21]

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff, Mike Koso, do have and recover from the defendant, United Verde Extension Mining Company, a corporation, the sum of Seven Thousand Five Hundred (\$7,500.00), and the plaintiff's costs herein taxed in the sum of \$45.70. [22]

In the District Court of the United States, for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

Notice of Motion for New Trial.

To Mike Koso and to F. L. Struckmeyer and R. B.
Westervelt, His Attorneys of Record:

You and each of you will please take notice that the defendant has filed its motion for a new trial in the above cause and that on April 5, 1920, hearing on said motion will be heard before above-entitled court at the courtroom thereof at Prescott, Arizona, if the court be then in session, or on the first law and motion day thereafter at which Prescott causes shall come on regularly for hearing or as soon thereafter as counsel can be heard. A copy of said motion is attached hereto.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

Prescott, Arizona, March 29, 1920.

[Endorsements]: Notice of Motion for New Trial. Recd. copy of within this 30 day of March, 1920. Struckmeyer & Westervelt. Filed Mar. 30, 1920. C. R. McFall, Clerk. [23]

In the District Court of the United States, for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

Motion for a New Trial.

Comes now the defendant in the above-entitled cause and respectfully moves the Court for a new trial for the following causes materially affecting substantial rights of said defendant. This application is based upon the pleadings and all papers filed in the above cause and upon minutes of the court and the transcript of testimony and instructions.

I.

Irregularity in the proceedings of the court and order of the Court whereby the challenge of the defendant to Juror F. L. France on the ground of his bias and prejudice against defendant was denied.

II.

Excessive damages which appear to have been given under the influence of passion or prejudice or both, in that (a) there was no proof or even evidence offered by plaintiff that he was not negligent, and (b) there was no evidence at all that the plain-

tiff suffered permanent injury, while the verdict was excessive even if permanent injury had been proved.

III.

Insufficiency of evidence to justify the verdict in that, (a) no evidence was offered or introduced to prove the [24] plaintiff was not negligent, which fact plaintiff was required to allege and prove under the Employers' Liability Law of Arizona as well as under the instructions given in this cause by the court; (b) no evidence was offered or introduced to prove the alleged injury was permanent and the verdict based upon a conclusion by the jury that the injury was permanent indicates an inference was drawn not based upon facts.

IV.

The verdict is against the law.

V.

Errors of law to the prejudice of the rights of the defendant occurred at the trial, to wit:

(a). The Court erred in denying the challenge of the defendant to the Juror F. L. France.

(b). The Court erred in admitting in evidence over objection of defendant the American Mortality Tables.

(c). The Court erred in making reference to the mortality tables in its instructions to the jury.

(d). The Court erred in instructing the jury that the mortality tables might be considered by the jury and in permitting the jury to consider the said tables or any facts or figures taken therefrom.

(e). The Court erred in denying defendant's

motion for an instructed verdict in favor of the defendant at the close of the evidence, for the aforesaid grounds, and especially for the reason that there was no proof or evidence showing the plaintiff was *not* negligent, the plaintiff had introduced no evidence that he was *not* negligent, proof of such fact being required by the Employers' Liability Law to be alleged and proved by the plaintiff, and evidence introduced by defendant showing that plaintiff was specifically warned by defendant to pick down any loose material before going to work was not refuted, but plaintiff did not introduce [25] evidence showing he obeyed the warning or exercised care that an ordinarily prudent miner of experience should exercise, or any care whatever.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

Prescott, Arizona.

[Endorsements]: In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Motion for a New Trial. Recd. copy of within this 30 day March, 1920. Struckmeyer & Westervelt. Filed March 30, 1920. C. R. McFall, Clerk. [26]

At a regular term, to wit, the April, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Phoenix, State and District of Arizona, on Tuesday, April 20, A. D. 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—April 20, 1920.)

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

**Minutes of Court—April 20, 1920—Order Submitting
Motion for New Trial.**

The motion for a new trial heretofore filed in this case by defendant is this day submitted and by the Court taken under advisement. [27]

At a regular term, to wit, the May, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of the City of Tucson, State and District of Arizona, on Monday, the 21st day of June, A. D. 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—June 21st, 1920.)

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

**Minutes of Court—June 21, 1920—Order Overruling
Motion for New Trial.**

IT IS ORDERED that defendant's motion for a new trial in this cause be and the same is hereby overruled, to which ruling of the Court the defendant duly excepts. [28]



In the District Court of the United States, in and for the District of Arizona.

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

Order Extending Time to File Bill of Exceptions.

The motion of the above defendant for a new

trial in the above cause having been overruled on June 21, 1920, and notice thereof having been mailed to the defendant on June 28, 1920, and said defendant having made application on June 29, 1920, for a reasonable time within which to perfect its appeal, and it appearing that no unreasonable delay will be caused thereby—

IT IS ORDERED that the above-named defendant be, and it is hereby granted to and until August 1, 1920, within which to prepare, tender and file its bill of exceptions herein and otherwise perfect its appeal to the Circuit Court of Appeals.

WITNESS my hand at Tucson, this 1st day of July, 1920.

(Signed) WM. H. SAWTELLE,
Judge of the District Court for the District of Arizona.

[Endorsements]: Order Extending Time to File Bill of Exceptions. Filed July 1, 1920. C. R. McFall, Clerk. [29]

At a regular term, to wit, the May, 1920, term of the United States District Court for the District of Arizona, held in the courtroom in the City of Tucson, State and District of Arizona, on Tuesday, July 6th, 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—July 6th, 1920.)

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

**Minutes of Court—July 6, 1920—Order Fixing
Amount of Supersedeas Bond.**

Upon application of the defendant, United Verde Extension Mining Company, a corporation:

IT IS ORDERED that supersedeas bond of said defendant to be furnished by said defendant in connection with writ of error in this cause be and the same is hereby fixed at the sum of Eight Thousand Five Hundred Dollars. [30]

In the District Court of the United States, in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

Stipulation in Re Bill of Exceptions, etc.

It is stipulated by and between the attorneys for the above-entitled plaintiff in error and defendant in error that all orders relating or pertaining to the settlement and signing of the bill of exceptions or records or papers or proceedings in connection with the appeal now pending so far as applying to the Judge of the District Court in and for the District of Arizona wherein the said case was tried may be made by Judge Sawtelle in San Francisco, California, with the same force and effect as if made in Arizona.

(Sgn.) F. C. STRUCKMEYER,
Attorney for Plaintiff.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsement]: Filed Aug. 2, 1920. C. R. McFall, Clerk. By W. W. Downing, Deputy Clerk.
[31]

In the District Court of the United States, in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

Notice of Filing Bill of Exceptions.

To Mike Koso, Plaintiff, and F. C. Struckmeyer and R. B. Westervelt, His Attorneys of Record:

You will please take notice that the defendant in the above-entitled cause desiring and intending to procure a writ of error from the above court in the above-entitled cause on the 25th of March, 1920, has prepared and this day mailed for filing in the office of the clerk of said court for presentation to Hon. W. H. Sawtelle, the Judge who tried the said cause, its bill of exceptions, copy of which is this day served upon you.

Dated this 3d day of July, 1920.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsements]: Notice of Filing Bill of Exceptions. Copy received this 3d day of July, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed July 6, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [32]

In the District Court of the United States, for the
District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING
COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

Be it remembered that afterward, to wit, on the 25th day March, 1920, at a term of the above court, held at Prescott in and for the District of Arizona, before his Honor, William H. Sawtelle, District Judge, the issues joined came on to be tried by a jury, the said Judge presiding; the plaintiff being represented by F. C. Struckmeyer, W. L. Barnum and R. B. Westervelt, and the defendant by Favour & Cornick; and upon trial the attorneys for the plaintiff called as a witness the plaintiff, MIKE KOSO, who being duly sworn, testified as follows:

Testimony of Mike Koso, for Plaintiff.

I am a native and citizen of Finland and am forty-two years old. I have been a sailor, and in mining the last eighteen years. I went to work for the defendant on the night of December 14th. I was hurt about six-thirty o'clock the next morning. At that time I was shovelling into a mine car on the 1200-foot level in which I had been told to work by the foreman. I was bending to get a shovel-full and rock fell from the roof. I was about [33] fifteen feet from the face of the dirt. I don't know whether there was more than one rock. The rock knocked me down and I lay down for perhaps fifteen minutes or a half hour. I could not get my wind. Then I started on my knees, then put my hands against the wall and got on my feet and walked into a station and lay down. Finally, I don't know how long I was sitting there, two car-

(Testimony of Mike Koso.)

men, Nick Thomas and another, came in with my hat. They telephoned the cage and tried to get me on it. Finally the cage came down and the shift boss came up from the 1300-foot level and they raised me up and put me on the cage and took me to the dry-house. They pulled off my clothes and put on clean ones and tried to wash my neck and back which were full of rocks and then the automobile came and took me to the hospital.

No one was working with me at the time I was hurt. I stayed in the hospital about twenty days—I think it is the company hospital—and then the doctor told me to get out. I stayed awhile at Jerome and then came back to Phoenix.

My back and my right shoulder were hurt and also some of my left foot over the little toe was sore awhile but is all right now. The rocks hit the whole length of my back (indicating).

Mr. STRUCKMEYER.—“And may the records show that the one place that the witness pointed, to the lower part of the vertebra.”

The COURT.—“I didn't see his hand; I don't know whether he did or not.”

Before this accident I was feeling good and had nothing on my back and shoulders; “I am, she is sore now.” I can move by limb around to-day and am able to do easy work but not hard work; after I work ten or fifteen days my back starts to hurt bad. I can stoop over a little but it hurts. I was receiving \$5.50 a day; I have always done hard work and cannot do writing or clerical work. (2) [34]

(Testimony of Mike Koso.)

Cross-examination of MIKE KOSO.

I took out first papers last summer. I was hurt on the first shift I worked for the company. I was standing fifteen feet from the face of the tunnel when the rock fell; I can't tell how high up it was but I could not have reached it with a pick. I was working in waste and don't know what kind of a tunnel it was or how wide or high it was. At the place where this rock fell it was not timbered and I saw no timbering in the tunnel though there may have been some back fifty feet; but it was soft ground where I was fifteen feet from the face and there was no timbering there. I don't know how big the rock was but it was soft rock else it would have killed me. When I started to get up the rock fell from both sides of me but I don't know how much there was. It hit me hard; I could not get my wind but did not lose consciousness. I laid there about fifteen mintes or half an hour and then got up and walked against the wall into the station and lay down there about an hour, I think. When the two carmen came they telephoned the cage and when this came they put me on it. One of the men went up with me and took me into the dry-house. I walked but the shift boss was holding me. They put me on a bench in the house and then the dryman took off my clothes; I could not lift my hand above my head. I had on undershirt, trousers and shoes. He put other clothes on me after he washed me. I could not lift my hands to put on my shirt. In the hospital I did not get up

(Testimony of Mike Koso.)

at first except with help. After ten days I put my clothes on every day; they helped me put my coat on, I could not turn my arm. Toward the last I put my clothes on and had an awful time. The doctor told me to get out and after a week or two weeks I went to Phoenix and have stayed there practically all the time since. In Phoenix I went to see a Doctor Nichols, at first every day, and he told (3) [35] me to lay down all I could. He wanted to put me in the hospital but I had no money. The other fellows that I lived with did the cooking. My foot got well and my shoulder-blade and back changed a little better. I did a little easy work in a cigar-store or pool-hall.

Redirect Examination of MIKE KOSO.

I do not know where Dr. Nichols is now; he has left Phoenix.

Recross-examination of MIKE KOSO.

I do not remember if my testimony was taken in Phoenix in or about August, 1918, it was a long time ago. Mr. Cox was my lawyer then. He refused to allow an examination by a doctor when requested at the hearing. I left it to Mr. Cox.

Testimony of Dr. Winn Wylie, for Plaintiff.

I have been a physician and surgeon between forty and fifty years and in Arizona between twenty-four and twenty-five years. I know Mike Koso and made an examination of him March 22d to 24th, 1920. I presume my examination was

(Testimony of Dr. Winn Wylie.)

made to determine his condition for the purpose of testifying in this case.

Mr. STRUCKMEYER.—“That is provided there was anything to testify about.”

Mr. CORNICK.—“We object to that.”

Mr. STRUCKMEYER.—“Pardon me, I withdraw that.”

I went over him carefully, taking his history, examining his body by sight, hearing and touch, then had X-ray photographs taken, and examined him with a fluroscope. The fluroscope enables one to see with the eye what the photograph plate shows in a photograph. The X-rays were taken under my direction.

Mr. STRUCKMEYER.—“We offer those X-rays, if your Honor pleases, photographs, as an aid, and illustrative of the testimony of the witness to be given.” (4) [36]

Mr. CORNICK.—“He took these and developed them himself.”

Mr. STRUCKMEYER.—“No, they were not developed by him.”

Mr. CORNICK.—“We object then.”

(The Court sustained the objection.)

The fluroscope shows to the eye the same that the photograph plate copies. I cannot give the whole of his condition but the part I observed.

“A. In the first place he has an hernia, a beginning hernia; a starting hernia on the right side. Hernia is another name for rupture. He has lost about fifty per cent of the power of his right hand.

(Testimony of Dr. Winn Wylie.)

There has been an injury to the scapula or shoulder-blade. And there has been an injury to the fifth lumbar vertebra on the right side that has been repaired by nature, and a bony ridge thrown out connecting the fifth lumbar vertebra with the first sacral vertebra. The injury to the scapula, the bone injury has united and there is more bony tissue there at present time than there was before he was injured.

“Q. What did that injury consist of?”

A. Fractures.

“Q. Now, the fifth lumbar vertebra, Doctor, whereabouts is that located in the body?”

“A. It is at that portion of the back where the gentleman (plaintiff) put his hand when it rested at the lower portion of the area that his hand covered.”

Whereupon plaintiff's counsel offered the American Mortality Tables.

Mr. CORNICK.—“May it please your Honor, there are different classes of individuals and the tables introduced without proof does not apply to all those and we submit they do not apply to miners and in this case we submit that they have no application without proof and so we object to them without proof. Our objection, your Honor, is this, that the Mortality Tables are based on the law of averages and they do not apply to specific instances of hazardous occupations, that a miner, a man engaged in the occupation of mining, would not fall within the law of averages and without explanation

that his mortality would be more great and his expectancy for, or shorter than the average (5), [37] and we would be entitled to have that shown in the construction of the Mortality Tables and without explanation, without their being proven, the Mortality Tables would not apply to this hazardous occupation.”

The COURT.—“Well, I will overrule the objection and give you an exception; there may be something in that objection but I prefer without any authority on the subject, I think I shall admit them.”

Whereupon the Court gave counsel for defendant an opportunity to obtain authority and recessed for the noon period. At convening of the court after the recess, counsel for defendant submitted authority, 34 S. W., page 331. The Court examined the authority and gave opportunity to counsel for plaintiff to examine it.

Mr. STRUCKMEYER.—“On previous occasions I have had occasion to examine the authority and that text is supported by those authorities. If your Honor pleases, I think that the evidence shows that he was not afflicted with any ailment at the time of the injury.”

The COURT.—“Yes, but there is one particular in which you haven’t brought yourself within that rule, that is that you have not shown anything as to the plaintiff’s previous habits. You did prove what his previous occupation was and what his age was at the time of the injury and so on, but you

(Testimony of Sampson Jiles.)

didn't offer any proof as to his previous habits."

Mr. STRUCKMEYER.—“Will not the presumptions aid there?”

The COURT.—“Very well, I have ruled with you, so if you are willing to take the chance, very well. You may have an exception. I shall charge the jury that the fact that the plaintiff was engaged in a more hazardous employment than the persons of whom the tables were taken of is a circumstance to be taken into consideration by the jury.” (6)
[38]

The plaintiff thereupon rested his case and the defendant called SAMPSON JILES, who being duly sworn testified as follows:

Testimony of Sampson Jiles, for Defendant.

I was born in England; I am a naturalized American citizen and live in Jerome; I have served in the United States army; I am now in the milk business and do not work for the defendant. Previously I was a miner for ten years and was jigger boss for the defendant at the time of the accident to Mike Koso. I had charge of five levels and thirty-two men, and worked from eleven-thirty P. M. to seven-thirty A. M. Koso was employed by the company and I went with him to his place of work on the 1200-foot level, which was a ventilation drift seven feet wide and five feet four inches across the top. Koso was working at the face of the drift with Nick Thomas and a man named Ropez. The drift was timbered to within less than

(Testimony of Sampson Jiles.)

three feet of the face and there was no room for another set. The roof was seven feet ten inches high, just within reach of a pick. The timbers came up to within two inches of the roof and the lagging was placed on top of them. There were no open spaces in the lagging and timbers. I went in with the foreman and put Koso to work and instructed him to pick down loose rock even if it took him the whole shift, and then to go ahead and muck. He said he was a miner, and his partner had been working over a month. It was five or six hundred feet from the face where he was working back to the station. I was making my rounds and was going with the cage to the 1200-foot level and I saw Koso coming out; I asked him what was wrong and he said he got hurt, and so we took him in the cage to the top and he walked to the dry-house. No one was with him when he came to the cage. The change man, who died last summer, and I were with him in the dry-house. No assistance at all was given Koso; he walked into the cage by himself and walked from the collar of the shaft to the dry-house about three hundred feet, went to his locker, undressed himself without any complaint, After he pulled his undershirt off I examined him and found scratches on his right shoulder and red marks lower down, but the skin was not broken. Afterwards he then went in (7) [39] and took a hot bath without assistance and without complaining. He came out and dried himself and dressed and walked out to the automobile I had ordered

(Testimony of Sampson Jiles.)

and went to the hospital. He did not complain and did not have the appearance of a man badly injured. After he got in the automobile I went down and examined the place where he got hurt and found about a bushel of fine dirt; there were no lumps as big as my fist. It was what we call waste, soft material. The roof was in good condition, just a little hole where the stuff had fallen from. I was never on the witness-stand before.

Cross-examination of SAMPSON JILES.

The small hole in the roof was made by the bushel of rock. The roof was perfectly even. The hole was not there when I put Koso to work. Koso did not wait at the station and there was no one else there but the cager and myself. Koso did not complain of pain or say he was unable to walk. He appeared as able to walk as if not hurt at all and walked to the dry-house and to the automobile without any complaint. He showed no signs of injury except the scratches, which I did not see until he took his shirt off. I called the automobile to take him to the hospital, although he presented no appearance of injury; I called it before I saw his back; I had authority to call as there was then no ambulances. I do not know where Nick Thomas is now; he worked for the company for some time afterwards.

Redirect Examination of SAMPSON JILES.

The scratches were pretty near down to the waist line. I called the automobile because it was office orders.

(Testimony of Sampson Jiles.)

Recross-examination of **SAMPSON JILES.**

I would call an automobile if he had a scratch on his hand.

Testimony of Erle Thompson, for Defendant.

I live in Jerome and am employment and claim agent of the defendant company and among other things assist counsel in regard (8) [40] to witnesses in the defense of causes. I knew Nick Thomas; he is in California but I do not know where.

Cross-examination of **ERLE THOMPSON.**

I know he said he was going to California. I did not have occasion to inquire whether he left a forwarding address; I think he was a single man; I don't know of any relatives in Jerome; I did not know whether he had friends and had no occasion to make inquiry. He was a miner.

Redirect Examination of **ERLE THOMPSON.**

Thomas left the employ of the defendant some time early in 1918, I think.

Testimony of Dr. L. P. Kaul, for Defendant.

I have been a physician and surgeon for twenty-two years; I graduated from the University of Kansas in 1898 and have been in active practice most of the time since with the United Verde Copper Company hospital at Jerome, and have had the direction of the surgery of the hospital and am acquainted with the effect of fractures of bones. I was captain in the Medical Corps in the United

(Testimony of Dr. L. P. Kaull.)

States army. It might be possible for a man who had broken his scapula to undress himself within one or two hours after the break, but the pain would be very great in taking off his shirt. In the very great majority of cases complete disability and paralysis would result from the fracture of the fifth lumbar vertebra, at least temporarily, and a man would absolutely not be able to walk within an hour or two after such a fracture.

Cross-examination of Dr. L. P. KAULL.

I did not go overseas but was stationed in this country. I am employed at the hospital of the United Verde Copper Company, which does the hospital work of the defendant company under contract. I have never been able to see an injury of this kind with a fluroscope though I use one daily. I know Dr. Wylie; he stands (9) [41] very high in his profession, and if he asserts the fluroscope does reveal such an injury, I would not question his statement.

Redirect Examination of Dr. L. P. KAULL.

If Dr. Wylie said he observed anything through the fluroscope I would not doubt his word, but this does not change what I have said about the effect of such an injury.

Testimony of Dr. H. T. Southworth, for Defendant.

I have been a physician and surgeon since graduation in 1901 and have had to do with fractures of bones. I was Major in the Medical Corps of the

(Testimony of Dr. H. T. Southworth.)

United States Army and for a time commanded the U. S. A. 8th Hospital at Nogales and did all the surgery there. It would be very painful for a man who had within two hours fractured his scapula to undress himself. The effect, within one or two hours of the fracture of the fifth lumbar vertebra of the right side would almost always be paralysis, at least partial, and movements would be very labored if possible at all.

Cross-examination of Dr. H. T. SOUTHWORTH.

I cannot imagine a slight fracture of the vertebra as unimportant. A bony ridge would probably not be thrown around the bone and connect with the other vertebra unless the body of the vertebra was injured. There might be a contusion of the vertebra without paralysis following. I cannot conceive of an impacted fracture of the vertebra not causing at least some degree of paralysis that would be visible to the layman. Paralysis would not necessarily follow the chipping off of a portion of the outside of the bone.

Defendant thereupon rested his case.

REBUTTAL TESTIMONY OF PLAINTIFF.

Testimony of Dr. Wylie, for Plaintiff (In Rebuttal).

The injury to the fifth lumbar vertebra I have testified to was not of a character to necessarily produce paralysis. (10) [42]

(Objected to by counsel for defendant, as examination in chief; objection sustained.)

Thereupon the counsel for defendant moved the

Court to direct a verdict in favor of the defendant, which motion was denied, and exception to said denial was noted.

Thereupon both sides having rested, the Court instructed the jury as follows:

Court's Charge to the Jury.

The COURT.—Gentlemen of the jury, this is an action brought by the plaintiff against the defendant to recover of the defendant the sum of twenty-five thousand dollars as damages for alleged personal injury, alleged to have been sustained by him while in the service and employment of the defendant.

The plaintiff alleges in his complaint that on or about six-thirty o'clock on December 15th, 1917, plaintiff was employed by the defendant and was engaged in the performance of work and labor for the defendant in shoveling certain loose rock and earth near the face of said twelve hundred foot drift or level into said mine for the purpose of being transported to the main shaft, and in performing said work plaintiff was using appliances furnished by defendant for the performance of said work; that said work and labor being so performed by plaintiff for defendant was work and labor in or about a hazardous occupation, the hazardous occupation of mining, and within the scope of plaintiff's employment and while so engaged in the regular course of said work, plaintiff was injured by an accident arising out of and in the course of his labor, service and employment and due to a

condition or conditions of such employment and without negligence on his part in (11) [43] the following manner, to wit: At about the above-mentioned time plaintiff was working in said twelve hundred foot drift or level at a point near the face of said drift and was engaged in shovelling loose rock and earth into said mine car as aforesaid, when certain large rock and boulders fell from the roof of said drift and struck the plaintiff on his shoulder and back and his left foot, knocking plaintiff down on the floor of said drift and cut, bruised, broke and mangled plaintiff's shoulder, back and foot and thereupon seriously, painfully and permanently injured the plaintiff.

Now, the defendant, in its answer, admits that plaintiff was in its employ on the date mentioned but it denies each and every other of the material allegations in the plaintiff's complaint. This casts upon the plaintiff the burden of proving by a preponderance of the evidence every material allegation of his complaint.

This action is brought under the Arizona Employer's Liability Law. Under the provisions of that act, an employer in certain hazardous occupations, among them mining, is liable for the personal injury or any employee, any workman injured by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment in all cases in which such injury of such employee shall not have been caused by his own negligence.

Before a verdict in any amount can be returned in favor of the plaintiff and against the defendant, it must be established by the greater weight of the evidence, first, that the accident complained of by the plaintiff was due to a condition or conditions of his occupation, and second, that it was not caused by his own negligence. (12) [44]

It was the duty of plaintiff, while in the employ of the defendant and at the time and place of the accident in question, to exercise reasonable care and prudence for his own safety. An employee may not place the whole burden of responsibility upon his employer for his safety, he must exercise such care as a reasonably prudent careful man under the same circumstances and conditions would exercise for his own safety, and if he fails to do so and is injured solely as a result of his own negligence, then the employer is not liable.

The first question you will determine is whether the plaintiff, at the time and place mentioned in the complaint and while in the service or employment of the defendant and in the course of his labor, received an injury or any injuries set forth in his complaint which I have just read to you, in order to determine that question you will consider all of the testimony and all of the facts and circumstances in evidence. You are not compelled to find that the plaintiff was injured merely because he claimed to have been injured but you are to consider his testimony as you would that of any other witness, taking into consideration the fact that he is interested in the result of the case and that he

would be the beneficiary of any verdict which you might render in his favor. However, you are not to disregard his testimony merely because he is the plaintiff and is interested in the result of the case, you consider his testimony as you would that of any other witness in the case.

It is your province to determine the credibility of the witnesses examined in the case, whether for the plaintiff or the defendant, and in weighing the testimony of the (13) [45] several witnesses you have the right to take into consideration their manner and appearance while giving their testimony, their means of knowledge, any interest or motive which they or either of them may have, if shown, and the probability or improbability of the truth of their several statements when considered in connection with all the other evidence in the case.

If you believe that any witness, whether for the plaintiff or the defendant, has wilfully sworn falsely to any material fact you have the right to disregard the testimony of such witness except in so far as his statement may be corroborated by other credible evidence in the case, or by the facts and circumstances in evidence.

It is your duty, in arriving at a verdict in this case, to be governed by the evidence in the case and the law, as herein given you by the Court, regardless of the fact that the plaintiff is an individual and the defendant is a corporation, and regardless of the condition of the parties to this suit financially and of the effect of your verdict upon the parties, or either of them.

Now, gentlemen, if you find from the testimony that the plaintiff at the time and place mentioned in the complaint sustained any of the injuries set forth in the complaint, and that such injury or injuries were not caused by or were not the result of the plaintiff's own negligence, you will next consider and determine the nature and extent of such injury so sustained, and in this connection, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injuries, defects and afflictions of which he complains, or some of them, are the proximate result of the accident.

(14) [46]

As before stated, you are made the judges as to the extent and degree of the injuries, if any, so sustained and that is, as to whether or not they were in fact received and whether or not they are permanent in character and as to what extent, if any, by reason of such injury plaintiff has suffered physical pain, also as to what extent, if at all, he has been by reason of such injury disabled and incapacitated from following his usual vocation as described in the complaint, or any vocation for which he is qualified and to what extent, if at all, as a result of said injury his spinal column has been impaired or his shoulder-blade or shoulder has been injured, or whether or not, and whether or not these incapacitations, if any, are permanent or merely temporary. All these points go to make up the nature and extent of the plaintiff's alleged injury and should you award the plaintiff damages in any amount it is your duty to consider each and

every one of these points as a factor in computing the amount, in computing the award.

If you find that the plaintiff is entitled to recover in this action the amount of recovery, if any, is for you to determine from all of the facts in the case. Of course, you could not measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say in the exercise of sound discretion, from all of the evidence in the case, after considering and weighing all of the evidence produced before you without fear and without favor and without passion and without prejudice what amount of money will reasonably compensate him for the damage, if any, he has sustained.

If you find for the plaintiff in this case under the instructions given you by the Court and that the plaintiff (15) [47] has sustained the damages as set forth in his petition in any amount, then to enable you to estimate the amount of damages it is not necessary that any witness should have expressed an opinion as to the exact amount of such damage, put you, the jury, may yourselves make such estimate from the facts and circumstances in proof, and by considering them in connection with your knowledge, observation and experience in the ordinary every day affairs of life.

Now, the term "due to a condition or conditions of the employment or occupation" as used in these instructions means more than that the accident in question and the injury to plaintiff, plaintiff was injured, arose out of and in the course of the work he was doing or was employed to do, they mean the

inherent risks and dangers of his occupation or employment which were not avoidable by him.

By the expression "preponderance of the evidence" as used in these instructions is meant the greater weight of the evidence, it does not necessarily mean that the greater number of witnesses shall be produced on one side or the other, it means the more convincing force or the greater probability of the truth of the evidence on one side when compared with or weighed against the evidence in opposition.

In the ascertainment of damages the law does not lay down any definite mathematical rule, it says that you, the jury must be governed by sound sense and good judgment and make such award of damages, if any, as would be just compensation. The testimony in this case shows that the plaintiff is now forty-two years of age and testimony has been received for the purpose of showing, or tending to show, that the probable duration of life of a person forty-two years of age is 26.72 years. And these mortality tables (16) [48] were admitted in evidence in this case in order to enable you to determine the probable duration of the plaintiff's life. It is stated that in actions for personal injuries, if the injury is of a permanent character, in estimating the damages the expectancy of life of a person injured is an essential element and to show such expectancy standard mortality tables are admissible in evidence. The fact that the person injured or killed was engaged in a more hazardous employment than the persons with reference to whom the

tables were made up, that is, the average man, is a circumstance—the average man of good health—is a circumstance to be taken into consideration by the jury as tending to show that his expectancy of life, that is, a man engaged in hazardous occupations, was less than the tables would indicate to one of his age but the tables are none the less admissible on that account.

Now, this testimony as to the plaintiff's age and his expectancy is based upon these American Mortality Tables, which are framed upon the basis of the average duration of the lives of a great number of persons and it has been held that the rule to be derived from such tables may not be the absolute guide of the judgment and consciousness of the jury in a case of this character. They may be, however, considered by the jury in connection with all other evidence in the case.

As before stated, if you find for the plaintiff you should award a fair and reasonable compensation, taking into consideration what the plaintiff's income was, what it probably would have been, how long it would have lasted, whether he would have been regularly employed and able to (17) [49] perform labor, whether sickness might overtake him and he would thereby lose as a result thereof and all the contingencies to which he was liable, that is, his earning capacity, and then award such compensation as you think would be fair and just.

Now, some people have an idea that you should find that a jury should find an amount which, put at eight per cent interest would, practically eight

per cent interest, would earn the same amount of money that the plaintiff was earning at the time he was injured, now manifestly it would not be proper for you to use a sum which put at eight per cent interest would earn an amount equal to the wages of this plaintiff, because at the end of the 26.72 years which it is claimed is plaintiff's life expectancy, of the average man of forty-two years, the plaintiff would not only have had the income from the principal sum all those years but he would also have remaining the principal and that is not a fair criterion to be followed or acted upon.

If, under the facts in this case and the law as I have stated it to you you come to the conclusion that the plaintiff is entitled to recover some amount of compensation for the injuries he claims to have sustained, you must not render what is known as quotient verdict, that is, you must not add together the amounts and sums which each of you believe plaintiff is entitled to and divide by twelve or any other number. Such or any similar method of arriving at plaintiff's compensation would be unlawful and the Court might be compelled to set aside the verdict if it is reached in such a manner.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly empaneled and sworn in the (18) [50] above-entitled case, upon our oaths do find for the plaintiff and assess his damages at so many dollars," inserting the amount which you determine should be awarded to him. Should you find for the defendant, the form of your verdict will be, "We, the jury, duly empaneled and

sworn in the above-entitled action, upon our oaths do find for the defendant." You will cause your foreman to sign the verdict which represents your conclusion. Your verdict must be unanimous. The rule which prevails in the State courts allowing nine jurors to return a verdict in civil cases does not prevail in the Federal Court. A jury, within the meaning of the Constitution of the United States, means a jury of twelve and therefore it requires the unanimous verdict of the entire jury before one can be returned.

Any exceptions on behalf of the plaintiff?

Mr. STRUCKMEYER.—None, I think.

The COURT.—Any on the part of the defendant?

Mr. CORNICK.—We desire to note an exception to one part of your Honor's charge, and to make two requests. We desire to note an exception to that part of your Honor's instructions with regard to the mortality tables as evidence in this case, because we believe that under your Honor's charge the instruction presumes the permanency of the injury. Exception allowed.

The COURT.—Well, if you or anyone else so understood me, I desire to correct it now, because I didn't assume, and I don't assume that the plaintiff has been permanently injured or injured at all, that is a question for the jury.

Mr. CORNICK.—Then we desire further, your Honor, to note an exception—(19) [51]

The COURT.—Pardon me, but I do say that if the jury does come to the conclusion that the in-

juries are permanent, then they may consider the Mortality Tables, if they come to the conclusion that the injuries are temporary and not permanent, then the Mortality Tables as to his expectancy of life should not be considered at all. Any further exceptions?

Mr. CORNICK.—May we have an exception to this explanatory charge?

The COURT.—Yes, you may.

Mr. CORNICK.—We have two requests, if your Honor please, and I have one other request which I didn't frame, if I might state it.

The COURT.—Well, the rule requires all requests to be presented before the argument begins so as to give me an opportunity to examine them before I charge the jury.

Mr. CORNICK.—I wasn't aware of that.

The COURT.—I might have given them if they had been offered sooner, but now I think I have substantially covered these and you may have an exception and also refusal to give them because they are offered too late.

The evidence hereinbefore set out in this bill of exceptions contains all the testimony given on the trial and constitutes all the evidence upon which the Court's instructions aforesaid were based and affecting the matters to which defendant's exceptions relate.

Thereafter the jury returned a verdict of Seventy-five Hundred (\$7500.00) Dollars in favor of the plaintiff. (20) [52]

Thereupon defendant's counsel made a motion

for a new trial, which motion was argued by the respective counsel on April 20th, 1920, and by the Court taken under advisement, and which motion was denied by said Court on June 21st, 1920.

The Court then caused an order to be entered giving the defendant until August 1st, 1920, to prepare its bill of exceptions and have it duly signed and filed.

The defendant's counsel in accordance with the rules of the Court submitted a draft of said bill of exceptions to counsel for the plaintiff on July 3d, 1920, and now, within the time aforesaid so allowed, presents this, its bill of exceptions, and asks that same be examined, approved and allowed by the Court and filed, made and deemed to be a part of the record in this cause.

The defendant prays that this bill of exceptions may be allowed, settled and signed.

FAVOUR & CORNICK,

Attorneys for Defendant.

We agree to the foregoing proposed bill of exceptions and have no objections to make thereto.

Attorney for Plaintiff.

Approved and allowed, August 31, 1920.

WM. H. SAWTELLE,

Judge. (21)

[Indorsements]: In the District Court of the United States, for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Bill of Exceptions. Copy recd. this 3 day of July, A. D.

1920, Struckmeyer & Westervelt. Filed July 6, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [53]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

And now comes the United Verde Extension Mining Company, defendant in the above-entitled action, and says: That on March 25, 1920, a jury duly impaneled in the above cause returned a verdict for the plaintiff for the sum of \$7,500.00, and judgment was entered accordingly in favor of the plaintiff; that in the proceedings, instructions and judgment had in this cause, certain errors were committed to the prejudice of the defendant, all of which will in more detail appear from the assignment of errors, which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for correction of errors so complained of, and that a transcription of the records of the proceed-

ings and the papers in this case duly authenticated may be transmitted to the said Circuit Court of Appeals.

FAVOUR & CORNICK,
Attorneys for Defendant.

Dated Aug. 26, 1920.

[Endorsement]: Petition for Writ of Error. Filed Aug. 28, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

Service of copy admitted this 26th day of August, 1920.

F. C. STRUCKMEYER,
R. B. WESTERVELT,
Attorneys for Plaintiff. [54]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now defendant, United Verde Extension Mining Company, and files herewith its following assignment of errors in connection with and as a part of its petition for a writ of error filed herein,

which it avers were committed by the Court in the proceedings in this cause, or otherwise committed in said proceedings, before and after the rendition of the judgment appearing in the records herein, and upon which assignment of errors defendant relied in the prosecution of the writ of error in the above-entitled cause from the said judgment herein entered.

I.

The Court erred to the prejudice of the defendant in overruling and denying defendant's motion that plaintiff be required to give security for costs, for the reason that the defendant had complied with all the requirements of the law of Arizona and under said laws the granting of the motion was mandatory, and there is no other or contrary rule of the United States District Court for the District of Arizona.

II.

The Court erred to the prejudice of the defendant in permitting the plaintiff to elect to proceed under the Employers' Liability Law of Arizona and in failing to sustain the defendant's [55] demurrer to the complaint, which joined an action *ex contractu* and an action *ex delicto*; for the reason that the said complaint attempted to state two causes of action inconsistent with each other and joined two alleged causes of action prohibited to be joined by the laws of Arizona.

III.

Prejudicial and reversible error to the prejudice of the defendant occurred and was committed when the attorney for the plaintiff offered (page 4, Bill

of Exceptions) as evidence certain alleged X-ray plates under circumstances raising the evident purport without proof, that said photographs were of plaintiff and showed plaintiff's condition, but which were not taken by and had not been developed by the plaintiff's expert witness or any other witness; for the reason that the attempt to introduce and offer was wholly unwarranted and the objection sustained by the Court which was necessary to the said totally unauthenticated and inadmissible evidence, because to fail to make objection would have been inexcusable, inevitably and manifestly raised in the minds of the jury the conclusion that the defendant sought to keep the said plates out, because they were photographs of plaintiff's alleged injuries and would reveal conditions damaging to the defendant; and the Court erred in refusing a new trial on account of this conduct of the attorney for the plaintiff prejudicial to defendant, if for no other reason.

IV.

Prejudicial and reversible error to the prejudice of the defendant was committed when the attorney for the plaintiff added the following comment (page 4, Bill of Exceptions), "That is, provided there was anything to testify about," to the following quoted answer of plaintiff's expert witness in [56] response to a question why the physical examination of the plaintiff had been made a few days prior to the trial: "I presume that my examination was made to determine his condition for the purpose of testifying in this case"; for the reason that said comment conveyed to the minds of the jury without

evidence to support, that the physican had found a very bad condition, else he would not have been called to testify; and the Court erred in denying defendant's motion for a new trial on account of this aforesaid reversible error and conduct on the part of the attorney for the plaintiff, if for no other reason.

V.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that no evidence was introduced in regard to the habits, conditions of living and social surroundings of the plaintiff.

VI.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that no evidence was introduced to show that the plaintiff had suffered any permanent injury as a result of the alleged accident.

VII.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that the said Tables based upon figures or statistics to show the expectancy of life of the average man [57] or selected risks, were not shown to be applicable to the expectancy of life or of work of plaintiff who was engaged in a hazardous occupation.

VIII.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that no evidence was introduced or instructions given to the jury to enable said jury to intelligently, or in any way, understand the necessary modifications that should be taken into consideration or to inform them that they could disregard the said Tables entirely, even in cases where a permanent injury had been proved or there was evidence of such permanent injury.

IX.

The Court erred to the prejudice of the defendant in denying the motion of the defendant (page 11, Bill of Exceptions), that the jury be directed to return a verdict for the defendant, said motion having been made after all testimony was in and the defendant having excepted to the denial of its motion; for the reason that no evidence was introduced on behalf of the plaintiff, or otherwise, to show or tend to show that the plaintiff was not negligent and that the alleged accident was not occasioned by the negligence or the wilful intent and purpose of, or violation of warnings and instructions by, the said plaintiff.

X.

The Court erred to the prejudice of the defendant in instructing the jury as follows, over objection and exception of defendant (pp. 19 and 20, Bill of Exceptions), that the American Mortality Tables might be considered: [58]

“The testimony in this case shows that the plaintiff is now forty-two years of age, and testimony has been received for the purpose of showing, or tending to show that the probable duration of life of a person forty-two years is 26.72 years. . . . Now, this testimony as to the plaintiff’s age and his expectancy is based upon the American Mortality Tables which are framed upon the basis of the average duration of the lives of a great number of persons and it has been held that the rate to be derived from such tables may not be the absolute guide of the judgment and consciousness of the jury in a case of this character. They may be, however, considered by the jury in connection with all other evidence in the case,”

for the reason that there was no evidence of permanency of the alleged injury of plaintiff and the said tables were inadmissible as evidence.

XI.

The Court erred to the prejudice of the defendant in instructions concerning Mortality Tables in failing to charge that the said tables might be totally disregarded; for the reason that the defendant objected and expected to (p. 20, Bill of Exceptions) the charge permitting consideration of mortality tables, and such instruction that the Tables may be totally disregarded, is requisite as a necessary modification or qualification, even in cases where mortality tables are considered to be admissible.

The Court erred to the prejudice of the defendant

in instructing the jury as follows (page 17, Bill of Exceptions) in reference to permanent injury:

“And these Mortality Tables were admitted in evidence in this case in order to enable you to determine the probable duration of the plaintiff’s life. It is stated that in action for personal injury, if the injury is of a permanent character, in estimating the damages the expectancy of life of a person injured is an essential element and to show such expectancy, standard Mortality Tables are admissible in evidence.”

[59]

for the reason that, while the statement may or may not be correct as a general statement of law, it presumes and gives the manifest and inevitable inference, that the injury in this case was permanent, else these tables would not have been admitted.

XIII.

The Court erred to the prejudice of defendant in giving the following instructions:

“If you find for the defendant, you should award a fair and reasonable compensation taking into consideration what the plaintiff’s income was, what it would probably have been, how long it would have lasted, whether he would have been regularly employed and able to perform labor; whether sickness might overtake him and he would thereby lose as a result thereof and all the contingencies to which he was liable, that is his earning capacity and then award such compensation as you think would be fair and just.”

for the reason that said instruction is vague and for the further reason that it assumes a permanent injury and future incapacity of work as well as a past incapacity, and conveyed to the minds of the jury the specific idea that the injury was permanent and for the further reason that the comment of the Judge in answer to the exception taken by the defendant, "Well, if you or anyone else so understood me, I desire to correct it now because I didn't assume, because I don't assume that the plaintiff has been permanently injured or injured at all, that is a question for the jury," was not made a part of the charge and therefore would not qualify the instruction, and further the said comment, if assumed to be a qualification, would not cure the error, since no withdrawal or qualification was made of the instruction with reference to Mortality Tables and said Tables were not then excluded from evidence, notwithstanding the instruction of the Court that standard Mortality Tables are admissible, [60] "if the injury is of a permanent character," set forth in full in Assignment XII hereinabove.

XIV.

The Court erred to the prejudice of defendant in instructing the jury as follows:

"The fact that the person injured or killed was engaged in a more hazardous employment than the persons with reference to whom the tables were made up, that is, the average man, is a circumstance—the average man of good health—is a circumstance to be taken into consideration by the jury as tending to show that his

expectancy of life, that is a man engaged in hazardous occupations was less than the tables would indicate to one of his age, but the tables are none the less admissible on that account," for the reason that the Mortality Tables are based upon average men of good health and do not apply to specific instances of hazardous occupations, and therefore not to this case.

XV.

Because the evidence at the trial was insufficient to justify the verdict, for the reason that there was no evidence introduced proving or tending to prove directly or by inference that the injury sustained by plaintiff was not caused by his own negligence or willful conduct, or violation of instructions and warning.

XVI.

Because the verdict and judgment entered thereon is against the law and unsupported by the evidence; for the reason that the verdict is excessive.

XVII.

The Court erred in denying the motion of defendant for a new trial by reason of the matters and things all and singular, set out in the foregoing assignment of errors, and contained in the motion for a new trial, all of which appear in the records of this cause, and especially because [61] excessive damages appear to have been given under the influence of passion or prejudice.

WHEREFORE, the defendant prays that for

said manifest errors, the judgment of the Court should be reversed.

FAVOUR & CORNICK,
Attorneys for Defendant.

Dated, August 26, 1920.

[Endorsements]: In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Assignment of Errors. Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 28, 1920, C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [62]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, United Verde Extension Mining Company, a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact surety business in the state of Arizona, as sureties, are held and firmly bound unto Mike Koso, defendant in error, in the full sum of Eight Thousand Five Hundred Dollars (\$8,500.00), the same being the amount of the bond fixed by the District Court of the United States, for the District of Arizona, by order duly entered on the records of said court on the 6th day of July, 1920, to be paid to the said defendant in error, his legal

representative, executor, administrator or successor, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of August A. D. 1920.

WHEREAS, on the 25th day of March, A. D. 1920, at the District Court of the United States, for the District of Arizona, in a suit pending in said court, between Mike Koso, plaintiff, and United Verde Extension Mining Company, defendant, a judgment was rendered in favor of plaintiff and against the said defendant, for the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), together with the sum of Forty-five and 70/100 Dollars (\$45.70), costs of action, and the said defendant has obtained a writ of error to reverse said judgment in the aforesaid action, and filed a copy thereof in the clerk's office of said Court, and a citation directed to the said Mike Koso, [63] plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said United Verde Extension Mining Company shall prosecute said writ of error to effect, and answer all judgments and costs if it fail to make said plea good, then the above obli-

gation to be void, else to remain in full force and effect.

UNITED VERDE EXTENSION MINING COMPANY,

By (Signed) L. A. KEHR,
Principal,

[Seal] Attest: (Sgd.) C. P. SANDS,
Secty.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By (Signed) JOSEPH H. MORGAN,
Attorney in Fact,

Attest: (Signed) F. G. BROWN, [Seal]
Attorney in Fact,
Sureties.

State of Arizona,
County of Yavapai,—ss.

On the — day of —, 1920, personally appeared before me — and —, respectively, known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein stated.

And the said — and —, being by me duly sworn, says, each for himself and not one for the other, that he is a resident [64] and householder of the said County of Yavapai, and that he is worth the sum of Eight Thousand Five Hundred Dollars (\$8,500.00) over and above his

just debts and legal liabilities and property exempt from execution.

Subscribed and sworn to before me this —— day of _____, A. D. 1920.

_____,
Notary Public.

My commission expires _____.

The within bond is approved both as to sufficiency and form, this 31 day of August, 1920.

WM. H. SAWTELLE,
Judge.

[Endorsements]: United Verde Extension Mining Company, a Corporation, Principal, and Hartford Accident and Indemnity Company, a Corporation organized and existing under the laws of the State of Connecticut and authorized to transact surety business in the State of Arizona, Sureties. Bond. Service of copy of bond admitted this 26th day of August, 1920. R. B. Westervelt, F. C. Struckmeyer. Filed August 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.
[65]

In the District Court of the United States in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Order Approving Bill of Exceptions.

The defendant, having served a copy of its proposed bill of exceptions upon the plaintiff, the said bill of exceptions having been duly filed and the counsel for the plaintiff not having made any suggestions or correction thereof, it is hereby certified that the said bill of exceptions is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of the cause, and constitutes all the testimony therein and contains the instructions of the Court and the exceptions to said instructions and correctly states the exceptions to the offering of introduction of and admitting of evidence and to rulings of Court as are therein set forth, and it is

ORDERED, that the said bill of *exceptions and* it hereby is approved, settled and allowed this 31st day of August, 1920.

WM. H. SAWTELLE,
Judge.

[Endorsements]: Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [66]

In the District Court of the United States in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

This matter coming on this day regularly to be heard upon application of the defendant, by its attorneys, for the allowance of a writ of error, upon its petition presented to the Court praying for the allowance of a writ of error on the assignment of errors intended to be urged by it and praying also that a transcription of the record and proceedings and papers from which the judgment was entered, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow Writ of Error, the plaintiff having given bond regularly approved and filed in the sum of \$8,500.00.

WM. H. SAWTELLE,
Judge.

Dated, August 31, 1920.

[Endorsements]: Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [67]

In the District Court of the United States in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Writ of Error. (Copy)

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, be-

tween Mike Koso, plaintiff, and the United Verde Extension Mining Company, a corporation, defendant, a manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records [68] and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 31st day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal]

C. R. McFALL,
Clerk.

By Clyde C. Downing,
Deputy.

Allowed Aug. 31, 1920.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the District Court of the United States in and for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation. Writ of Error. Copy served this — day of August, 26, 1920, and accepted. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [69]

In the District Court of the United States in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Citation on Writ of Error. (Copy).

The President of the United States to Mike Koso and to F. C. Struckmeyer, W. L. Barnum and R. B. Westervelt, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be

78 *United Verde Extension Mining Company*

holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Extension Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this 31 day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. [70]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoenix, Az., Sept. 2, 1920, and executed the same Sep. 2, 1920, at Phoenix, Az., by delivering a true copy to F. C. Struckmeyer, personally.

J. P. DILLON,
U. S. Marshal.
By C. V. Culp,
Deputy.

Filed Sept. 2, 1920. C. R. McFall, Clerk. By
Clyde C. Downing, Deputy Clerk.

[Endorsements]: In the District Court of the
United States for the District of Arizona. Mike

Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Citation. Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [71]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the United States District Court for the District of Arizona:

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error to be perfected to said Court in said cause and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll.

Notice of Motion for Security of Costs.

Motion and Affidavit for Security for Costs.

Order Overruling Defendant's Demurrer.

Transcript of all Minute Entries.

Motion for New Trial.

Order Extending Time to File Bill of Exceptions.

Bill of Exceptions.

Acknowledgment of Service of Bill of Exceptions.

Stipulations that Orders may be Made in California.

Order Allowing Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Order Allowing Writ.

Order Fixing Bond.

Bond on Writ of Error.

Writ of Error.

Citation.

Praeipie for Transcript.

and all other records, entries, pleadings, proceedings, papers and files necessary and proper to make a complete record upon said writ of error in said cause.

Said transcript to be prepared as required by the law and the rules of this Court and the rules of the said United States Circuit Court of Appeals for the Ninth Circuit.

FAVOUR & CORNICK,

Attorneys for Defendant.

[Endorsement]: Praeipie. Service of copy admitted the 27th day of August, 1920. F. C. Struck-

meyer, R. B. Westervelt, Attorneys for Plaintiff.
Filed Aug. 28, 1920. C. R. McFall, Clerk. By
Clyde C. Downing, Deputy Clerk. [72]

In the District Court of the United States in and
for the District of Arizona.

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**Order Enlarging Time to and Including November
1, 1920, to File Record and Docket Cause.**

On consideration of the application of C. R. McFall, Clerk of the United States District Court for the District of Arizona, and good cause appearing therefor,—

It is ORDERED that the time within which the original certified transcript of the record in the above-entitled cause may be filed and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is extended and enlarged to and including the 1st day of November, 1920.

82 *United Verde Extension Mining Company*

Dated at Tucson, Arizona, this 28th day of September, 1920.

WM. H. SAWTELLE,
Judge of the United States Dist. Court for the Dist.
of Arizona.

[Endorsements]: Filed September 28, 1920. C.
R. McFall, Clerk. [73]

In the District Court of the United States in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Mike Koso, Plaintiff, vs. the United Verde Extension Mining Company, a Corporation, Defendant, said

case being No. 45-Prescott, on the docket of said court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the city of Phoenix, State and District, aforesaid.

I further certify that the original writ of error and citation on writ of error are incorporated in said transcript of record.

I further certify that the cost of preparing and [74] certifying to said record amounts to the sum of Twenty-one and 50/100 Dollars, and that same has been paid in full by the plaintiff in error, United Verde Extension Mining Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Phoenix, in said District, this 30th day of September, 1920, and of the Independence of the United States of America the one hundred and forty-*fifth*.

[Seal] C. R. McFALL,
Clerk United States District Court, District of
Arizona. [75]

In the District Court of the United States in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Writ of Error. (Original)

The President of the United States to the Honor-
able Judge of the United States District Court
for the District of Arizona, GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment, of a plea which
is in the aforesaid District Court before you, be-
tween Mike Koso, plaintiff, and the United Verde
Extension Mining Company, a corporation, defend-
ant, a manifest error has happened to the great
damage of the said defendant, as by its complaint
and assignment of errors appears, we being willing
that error, if any there has been shall be duly
corrected and full and speedy justice done to the
parties aforesaid in this behalf, do command you
if judgment be therein given, that then under your
seal, distinctly and openly, you send the record and
proceedings aforesaid, with the things concerning
the same, to the United States Circuit Court of
Appeals for the Ninth Circuit, together with this
Writ, so that you have the same at San Francisco,

California, in said Circuit within thirty (30) days of the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that the records [76] and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 31st day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal]

C. R. McFALL,
Clerk.

By Clyde C. Downing,
Deputy.

Allowed Aug. 31, 1920.

WM. H. SAWTELLE,
Judge. [77]

[Endorsed]: In the District Court of the United States in and for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation. Writ of Error. Copy served this — day of August, 1920, and accepted. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff.

Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [78]

In the District Court of the United States in and
for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Citation on Writ of Error. (Original).

The President of the United States to Mike Koso,
and to F. C. Struckmeyer, W. L. Barnum and
R. B. Westervelt, Your Attorneys, GREET-
ING:

You are hereby cited and admonished to be and
appear at the session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be
holden at the city of San Francisco, California, in
said Circuit, within thirty (30) days from the date
hereof, pursuant to the writ of error filed in the
clerk's office of the District Court of the United
States for the District of Arizona, wherein the
United Verde Extension Mining Company is plain-
tiff in error and you are defendant in error, to
show cause, if any there be, why the judgment in
said writ of error mentioned, should not be cor-
rected and why speedy justice should not be done
to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this 21 day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona.

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoeniz, Az., Sept. 2, 1920, and executed the same Sep. 2, 1920, at Phoeniz, Az., by delivering a true copy to F. C. Struckmeyer personally.

J. P. DILLON,
U. S. Marshal.
By C. V. Culp,
Deputy.

Filed Sept. 2, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [79]

[Endorsed]: In the District Court of the United States in and for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Citation. Service of copy admitted this 26 day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff.

Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [80]

[Endorsed]: No. 3580. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Extension Mining Company, a Corporation, Plaintiff in Error, vs. Mike Koso, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed October 2, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.